

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS**

R'KES STARLING, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

PR ADVISORS, LLC D/B/A PINNACLE  
REALTY ADVISORS

AND RAM PROPERTIES LLC

Defendants.

Case No. 24-991

**PLAINTIFF'S OPPOSITION TO THE  
DEFENDANTS' MOTION TO STAY OR BIFURCATE DISCOVERY**

The Court should deny Defendants' Motion to Stay or Bifurcate in all respects because staying or bifurcating the case will be inefficient and prejudicial.

**I. A Stay Would be Prejudicial**

In the Fifth Circuit, staying discovery while a motion to dismiss is pending "is the exception rather than the rule." *Griffin v. Am. Zurich Ins. Co.*, No. 3:14-cv-2470-P, 2015 U.S. Dist. LEXIS 178956, 2015 WL 11019132, at \*2 (N.D. Tex. Mar. 18, 2015). A motion to stay discovery is not "automatically granted whenever a motion to dismiss is pending." *Id.* "Nor is a stay of discovery permitted merely because defendant believes it will prevail on its motion to dismiss." *Id.* "[H]ad the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect." *Valenzuela v. Crest-Mex Corp.*, No. 3:16-cv-1129-D, 2017 U.S. Dist. LEXIS 98963, 2017 WL 2778104, at \*5 (N.D. Tex. June 26, 2017). An order staying discovery should only be issued upon a showing of "good cause" by the

movant. *Griffin*, 2015 U.S. Dist. LEXIS 178956, 2015 WL 11019132, at \*2; *see* FED. R. CIV. P. 26(c).

"A motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)). Furthermore, "[w]hile, in theory, a court may find good cause to stay discovery when there is a pending 12(b)(6) motion, in practice such stays are very rare, and almost never wise." *YETI Coolers, LLC v. Magnum Solace, LLC*, No. 1:16-CV-663-RP, 2016 U.S. Dist. LEXIS 144473, 2016 WL 10571903, at \*1 (W.D. Tex. Oct. 19, 2016) (Austin, Magis. J.). This case does not present unusual circumstances as PR Advisors, LLC, which does business under the name Pinnacle Realty Advisors, and joined by Defendant RAM Properties, LLC, make a bold assertion: that the Plaintiff cannot establish direct liability as to either Defendant, *despite the very text at issue* stating that it was sent from "Ryan McLemore, Pinnacle Realty Advisors." This plain admission in the text of the violative text message makes this case unique, as Defendants are now trying to dismiss the case against them, *despite identifying themselves directly on the violative messages*. The Plaintiff is required to plead no more to meet Rule 8's pleading standards. For this reason, this Court, like nearly every other Court to consider similar form motions, will likely reject it, but it certainly doesn't support a stay. Similarly, the Defendants claim that the Plaintiff has failed to allege that he received the calls to a "residential" cell phone and that they were not "telephone solicitations", but those assertions are belied by the Plaintiff's plain allegations and the content of the messages. The Defendants final arguments as to treble damages and an injunction doesn't even result in complete dismissal of the case.

Moreover, a stay related delay would prejudice Plaintiff and other class members by amplifying the risk that evidence will be lost or destroyed. *E.g.*, *Saleh v. Crunch, Ltd. Liab. Co.*, No. 17-62416-Civ-COOKE/HUNT, 2018 U.S. Dist. LEXIS 36764, at \*4-5 (S.D. Fla. Feb. 28, 2018) (“a stay would prolong this matter on the Court’s docket and could conceivably prejudice Plaintiff by the fading memory of any witnesses”); *Lathrop v. Uber Techs., Inc.*, No. 14-CV-05678-JST, 2016 WL 97511, at \*4 (N.D. Cal. Jan. 8, 2016) (plaintiffs in putative class action may “suffer prejudice from a stay because the case would extend for an indeterminate length of time, increase the difficulty of reaching class members, and increase the risk that evidence will dissipate”).

The risk to the putative class members’ interests is not merely hypothetical. Multiple decisions in TCPA class action cases have turned on the destruction of records necessary to identify class members. *E.g.*, *Levitt v. Fax.com*, No. 05-949, 2007 WL 3169078, at \*2 (D. Md. May 25, 2007) (denying class certification in a TCPA case because “critical information regarding the identity of those who received the facsimile transmissions” was not available); *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 831 (D. Md. 2011) (granting the defendant summary judgment for the substantially the same reason). As a result, courts regularly permit plaintiffs to commence discovery prior to a Fed. R. Civ. P. 26(f) conference related to these issues implicating non-parties in TCPA cases. *See e.g.* *Cooley v. Freedom Forever LLC et. al.*, Civil Action No. 2:19-cv-562, ECF No. 37 (D. Nev. July 19, 2019); *Cooley v. First Data Merchant Services, LLC et. al.*, Civil Action No. 19-cv-1185, ECF No. 32 (N.D. Ga. July 8, 2019); *Abante Rooter and Plumbing, Inc. v. Birch Commc’ns, Inc.* Civil Action No. 15-cv-03562, Dkt. No. 32 (N.D. Ga. 2016); *Mey v. Interstate National Dealer Services, Inc., et al.*, Civil Action No. 14-cv-01846, Dkt. No. 23 (N.D. Ga. Aug. 19, 2014). There are also other prejudices not associated with calling records that the

Plaintiff will face from a stay. *See Sanaah v. Howell*, 2009 Civil Action No. 08-cv-02117-REB-KLM, U.S. Dist. LEXIS 35260, \*2 (D. Colo. Apr. 9, 2009) (“with the passage of time, the memories of the parties and other witnesses may fade, witnesses may relocate or become unavailable, or documents may become lost or inadvertently destroyed.”). Here, the Plaintiff is simply seeking to proceed in the ordinary course with discovery. In denying a motion to stay, another federal court considered this issue in a TCPA case:

In addition, Orangetheory has not demonstrated irreparable injury; it notes only that it is potentially on the hook for substantial damages, given the putative nationwide class. Monetary damages, of course, do not by themselves constitute irreparable injury. Simon, on the other hand, persuasively argues that she would be injured by a stay, particularly because discovery has yet to commence, and evidence is at risk of being lost. This injury, which is both likely and irreparable, far outweighs the injury posed by a potential future judgment for money damages.

...

In the meantime, it is clear that critical evidence, including [\*22] records from any third parties that Orangetheory may have contracted with for its telephone marketing, may be lost or destroyed.

*Simon v. Ultimate Fitness Grp., LLC*, Case No. 19-cv-890, 2019 U.S. Dist. LEXIS 147676, at \*18, 21-22 (S.D.N.Y. Aug. 19, 2019).

## **II. Bifurcation of Discovery Would be Inefficient and Prejudicial**

The Defendants don’t rely on anything unique or dispositive about the Plaintiff’s claims that support bifurcation. Furthermore, Defendants has not provided any information to identify how Defendants’ other telemarketing calls were made in a materially different way than that of the Plaintiff’s. As such, the Court should deny the request because Defendants’ proposal is unfair, unworkable, and inefficient. Indeed, faced with a nearly identical motion, another denied the request in another TCPA case under similar circumstances:

The Court has reviewed the parties' joint status report [10]. The Court does not see a need to bifurcate discovery in this case. There will be some overlap in discovery here.

Discovery as to commonality and typicality under Rule 23 will also apply to the merits of the claim. Moreover, the Supreme Court in *Walmart v Dukes* has said the district court must conduct a rigorous analysis in determining class certification and that will often require some evaluation about facts that go to the merits of a plaintiff's underlying claims. Thus, bifurcating discovery often does not make sense as the lines between "class discovery" and "merits discovery" are significantly blurred.

*See Katz v. Allied First Bank, SB*, Civil Action No. 22-cv-5277, ECF No. 14 (January 3, 2023).

The Court should decide the same here. Indeed, as the Fifth Circuit Court of Appeals has cautioned, "Although within a district court's discretion, the Fifth Circuit has instructed bifurcation is only appropriate in exceptional circumstances." *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 (5th Cir. 1993) ("Separation of issues, however, is not the usual course that should be followed."). As part of that caution, the "issue to be tried separately must be so distinct and separable from the others that a trial of it alone may be had without injustice." *Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D. La. 1992) (quotation cleaned up) (quoting *Swofford v. B & W, Inc.*, 336 F.2d 406, 415 (5th Cir. 1964)).

District courts have broad discretion to control discovery. *Crawford—El v. Britton*, 523 U.S. 574, 598-99, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). However, as stated above, "Although within a district court's discretion, the Fifth Circuit has instructed bifurcation is only appropriate in exceptional circumstances." *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 (5th Cir. 1993) ("Separation of issues, however, is not the usual course that should be followed."). As part of that caution, the "issue to be tried separately must be so distinct and separable from the others that a trial of it alone may be had without injustice." *Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D. La. 1992) (quotation cleaned up) (quoting *Swofford v. B & W, Inc.*, 336 F.2d 406, 415 (5th Cir. 1964)).

Indeed, bifurcation of discovery is often "counterproductive." Manual For Complex Litigation (Fourth) ("MCL 4th") § 21.15 (2015). That is readily apparent here. To begin, the

proposed bifurcation guarantees that the parties will need to duplicate their work. First, the parties would undertake “individual merits” discovery and all that entails: written discovery requests, depositions, and then expert disclosures and expert depositions, all limited just to the merits of Plaintiff’s individual claims. Then, defendants file a dispositive motion limited to the merits of Plaintiff’s individual claims. And then, should the Court deny that motion, the parties have to start all over again, serving discovery requests and taking depositions of the same witnesses a second time, but this time focusing on the single class certification issue of the Defendant’s choosing (commonality). And after that, there would be a second round of dispositive motions on the class claims. All told, this means at least two rounds of written discovery, two rounds of depositions (with the same witnesses being deposed twice), and then two rounds of summary judgment briefing. This is the opposite of judicial economy. Indeed, “bifurcation of discovery in this case will increase litigation expenses by protracting the discovery period and by duplicating the discovery process, including the depositions.” *Hartley-Culp v. Credit Mgmt. Co.*, 2014 U.S. Dist. LEXIS 130308, \*10 (W.D. Pa. September 15, 2014). The Court could deny the motion to bifurcate for this reason alone. *See ibid* (denying similar motion to bifurcate merits and class discovery in a TCPA case); *EQT Prod. Co. v. Terra Servs., LLC*, 2014 U.S. Dist. LEXIS 203680, \*4 (W.D. Pa. October 21, 2014) (“Terra’s proposal would likely result in deposing the same witnesses twice—once in the liability phase, and again in the damages phase. This is the definition of inconvenience, and the additional cost of duplicative depositions and document review combine to counsel against bifurcation in this case.”)

Apart from the duplication of discovery outlined above, Defendants’ proposal is bound to lead to additional discovery disputes and proceedings that would be completely unnecessary without bifurcation. There is significant overlap between discovery relevant to the merits of

Plaintiff’ individual claims and issues of class certification. Indeed, “[class certification] analysis will frequently entail overlap with the merits of the Plaintiff’ underlying claim . . . because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the Plaintiff’ cause of action.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (internal citations and quotations omitted). *Lakeland Reg’l Med. Ctr. v. Astellas US, LLC*, 2011 U.S. Dist. LEXIS 16684, \*4 (M.D. Fla. 2011) (“the line between ‘class issues’ and ‘merits issues’ is practically difficult, if not impossible, to determine.”) Notes of Advisory Committee on 2003 Amendments to Fed. R. Civ. Pro. 23(c)(1)(A) (“Active judicial supervision may be required” to avoid “an artificial and ultimately wasteful decision between ‘certification discovery’ and ‘merits discovery.’”)

For instance, are Defendants’ communications and process for complying with the TCPA in general class discovery or merits discovery? Is Defendants’ record and process it presumably intends to assert led to the purported consent for the calls class discovery or merits discovery? Given this overlap, bifurcation would “belie principles of judicial economy, as the Court may be forced to spend time and resources resolving discovery disputes over what is ‘merit’ discovery as compared to ‘class’ discovery.” *In re Plastics Additives Antitrust Litig.*, 2004 U.S. Dist. LEXIS 23989, \*9 (E.D. Pa. November 29, 2004); (citing *In re Hamilton Bancorp. Inc. Securities Litigation*, 2002 WL 463314, at \*1 (S.D. Fla. Jan. 14, 2002) (noting that ‘bifurcation of discovery may well-increase litigation expenses by protracting the completion of discovery, coupled with endless disputes over what is ‘merit’ versus ‘class’ discovery’)).

The inevitable disputes about what qualifies as merits vs. class discovery is thus a second reason to deny the request for bifurcation. As another Court held while denying a similar request for bifurcation of discovery:

In fact, bifurcation would have the opposite effect. Much of the discovery sought appears [\*7] relevant to both the class and individual claims, including documents concerning Plymouth's telemarketing scripts, policies, contracts, practices and procedures, complaints received, investigations of those complaints and audits of third-party providers, as this information is relevant to the issues of both vicarious liability for third-party conduct and willfulness. *Accord* DE [25] (Defendant arguing that it has a "strong defense" because it cannot be held "vicariously liable" for the conduct at issue as it relates to Plaintiff and recognizing the difference in recovery for a "willful" violation of the statute).

*Charvat v. Plymouth Rock Energy, LLC*, No. 15-CV-4106 (JMA) (SIL, 2016 U.S. Dist. LEXIS 6778, at \*6-7 (E.D.N.Y. Jan. 12, 2016). Indeed, another Court found the same when denying a motion to bifurcate in a TCPA case in *Cardenas v. Resort Sales by Spinnaker, Inc.*, 2021 U.S. Dist. LEXIS 34923, \*6-7 (D. SC.):

The Court finds highly instructive *Ahmed v. HSBC Bank USA, Nat'l Assoc.*, No. EDCV15057FMOSPX, 2018 U.S. Dist. LEXIS 2286, 2018 WL 501413 (C.D. Ca. Jan. 5, 2018). In *Ahmed*, a TCPA action, the court denied the defendant's motion to bifurcate discovery. The court found that bifurcation could lead to undue delay and could encourage gamesmanship by the defendant in responding to plaintiff's discovery requests. The *Ahmed* court reasoned:

In light of [*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)] and the "rigorous analysis" requirement for class certification, many courts "are reluctant to bifurcate class-related discovery from discovery on the merits." This is because the distinction between class certification and merits discovery is murky at best and impossible to determine at worst. Separating merits and class discovery "raise[s] a slew of issues as to what discovery relates to the class, as opposed to the named plaintiffs, thereby causing additional litigation regarding the distinction between the two." For example, bifurcation often creates unnecessary gaps in the evidence as a defendant has a strong incentive to withhold evidence even if such evidence "overlap[s] [\*7] with the merits of the plaintiff's underlying claim" or "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."

In addition to "rais[ing] a slew of issues," "[a]rbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes." For example, even if the class is not certified, the case will still continue and the discovery produced during the course of the case will be relevant and useful for the remainder of the case.



This Court should find the same.

Finally, the Court should deny the motion to bifurcate because it will prejudice Plaintiff's case. Defendants' request to limit discovery initially to its preferred issues is "untenable and unfair." *Wilson v. Quest Diagnostics, Inc.*, 2019 U.S. Dist. LEXIS 224798, \*9 (D. N.J. August 22, 2019) (denying similar request to bifurcate in a TCPA case). "The Court should not allow one side to pick one defense of its choosing, limit discovery to that issue, and then presumably try a summary judgment motion. Both sides have a right to discovery." *Ibid.*

There is a real risk that the requested bifurcation will prejudice Plaintiff through the loss of evidence held by third parties, such as any third-party vendors involved in the maintenance of Defendants' calls. *See Briscoe v. Klaus*, 538 F.3d 252, 259 (3rd Cir. 2008) ("Generally, prejudice includes 'the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party.'"); *Hartley-Culp* 2014 U.S. Dist. LEXIS 130308 at \*9 (denying similar request in another TCPA case after "find[ing] prejudice to Plaintiff if discovery was bifurcated" in the same manner requested here); *Sanaah v. Howell*, 2009 U.S. Dist. LEXIS 35260, \*2 (D. Colo. 2009) ("with the passage of time, the memories of the parties and other witnesses may fade, witnesses may relocate or become unavailable, or documents may become lost or inadvertently destroyed."); *Saleh v. Crunch, LLC*, 2018 U.S. Dist. LEXIS 36764, at \*5 (S.D. Fla. Feb. 28, 2018) (denying a stay in a TCPA case and noting that the "fading memory of any witness" is prejudicial).

Any potential bifurcation will also necessarily delay class discovery and Plaintiff's motion for class certification prejudicing Plaintiff and the proposed class members. *See Fed. R. Civ. P. 1, 23(c)(1)(A)*. Delays in class discovery compound the already-substantial difficulty of gathering information necessary to identify class members and establish their claims. *See*

*Koppelman v. Galt Ocean Manor Condo. Ass'n, Inc.*, No. 16-CV-62175, 2016 WL 6777896, at \*1 (S.D. Fla. Nov. 16, 2016) (“when discovery is delayed or prolonged it can create case management problems which impede the [c]ourt's responsibility to expedite discovery and cause unnecessary litigation expenses and problems”). Additionally, any delay creates the risk that the evidence Plaintiff needs to prevail on his claim will be destroyed, lost, corrupted, or forgotten. *Lathrop v. Uber Techs., Inc.*, 2016 U.S. Dist. LEXIS 2490, at \*12 (N.D. Cal. Jan. 8, 2016) (Plaintiff in putative class action may “suffer prejudice from a stay because the case would extend for an indeterminate length of time, increase the difficulty of reaching class members, and increase the risk that evidence will dissipate”); *accord Izor v. Abacus Data Sys.*, 2019 U.S. Dist. LEXIS 130865, at \*10 (N.D. Cal. Aug. 5, 2019) (denying request in TCPA case).

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The Court should therefore deny the Defendant’s motion to stay or bifurcate in all respects.

RESPECTFULLY SUBMITTED AND DATED this March 18, 2025.

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/s/ Andrew Roman Perrong